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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MODESTO MORALES LEON and ALBERTO MORALES, Defendants and Appellants.	G042124 (Super. Ct. No. RIF130284) O P I N I O N

Appeals from judgments of the Superior Court of Riverside County, Elisabeth Sichel, Judge. Affirmed.

Douglas Bader for Defendants and Appellants.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendants Modesto Morales Leon (Leon) and his son Alberto Morales (Morales) were charged together in an information although they were not jointly charged in any count. The cases were tried together with separate juries.

Leon contends the trial court erred in admitting into evidence a drawing the victim made of Morales's penis, and by permitting his jury to hear the victim in his case testify to having been repeatedly molested by Morales. He also argues his attorneys were ineffective. Morales asserts the trial court abused its discretion in sentencing him to 10 consecutive 15 years to life terms based upon the mistaken belief the court was required to impose consecutive sentences and imposition of the sentence violated his Sixth Amendment right to a jury trial as stated in *Cunningham v. California* (2007) 549 U.S. 270. We affirm.

I

FACTS

The Charges and Sentences

Leon was charged with aggravated sexual assault on a child, B., under the age of 14 and more than 10 years younger than him on or between January 2005 and January 2006 (Pen. Code,[1] § 269, subd. (a)(1), count one). Morales was charged with eight counts of forcible lewd acts on a child under 14 years of age, B., between June 2004 and January 2006 (§ 288, subd. (b)(1), counts two through nine), forcible lewd act on a child under 14 years of age, R., between January 2003 and January 2005 (count ten), and three additional counts of forcible lewd act on a child under the age of 14, R., between January 2003 and January 2005 (counts eleven through thirteen). The information also alleged Morales's offenses involved more than one victim (§ 667.61, subd. (e)(5)).

Morales's jury found him guilty of eight counts of molesting B. (counts two through nine), two counts of molesting R. (counts ten and eleven), and found true the

[1] All statutory references are to the Penal Code unless otherwise stated.

allegation that Morales's offenses involved more than one victim. Counts twelve and thirteen (two of the four counts naming R. as the victim) were dismissed during trial. Leon's jury found him guilty of the aggravated sexual assault. The court sentenced Leon to 15 years to life in state prison and sentenced Morales to 10 consecutive terms of 15 years to life in state prison.

Procedural Setting

In May 2007, Leon's attorney, Jorge Hernandez, filed a motion to sever Leon's trial from the trial of Morales. The motion was argued on June 14, 2007. The court declined to rule on the motion, stating the motion should be decided by the trial judge. On April 23, 2008, Lawrence Harrison substituted in as counsel of record for Leon and the court relieved Hernandez. The severance motion was never renewed.

Trial began in July 2008. The defendants were tried together with separate juries. Both juries were present for opening statements of the attorneys and the testimony of the first witness, B.

Family Members

At the time of trial, B. was 13 years old and about to enter the ninth grade. R. was about to enter the fifth grade.

Leon and Bertha have four sons, G., Marcos, Morales, and M. Grace is B.'s mother and M. is B.'s stepfather. G. is R.'s father.

Morales's Molestations of B.

Morales first touched B. inappropriately sometime between 2003 and 2006. She was in her living room in the house next door to her grandparents, watching the movie Signs with her parents and Morales. Her parents went to the store to buy some snacks, leaving B. alone with Morales. B. and Morales were on the couch when B.

started hugging Morales because the movie frightened her. Morales put his hand on B.'s "butt" on top of her clothes. B. felt "uncomfortable" because she knew it was "wrong." B. asked Morales what he was doing. He told her repeatedly, "It's okay," and kept rubbing B.'s "butt." Morales stopped when he saw the lights from B.'s parents' car as they returned from the store. Morales told B. not to tell her parents because they both would get into trouble. Grace, corroborated B.'s testimony about watching the movie Signs with Morales and that she left B. alone with Morales while she and M. went to the store to buy snacks.

B. was in the sixth grade the next time Morales touched her inappropriately. It happened while she was home from school with a stomach flu. She was in her mother's bedroom when her grandmother Bertha entered and told her to go next door. B. went to her grandmother's house and laid on the couch in the living room. Morales, who had been outside, entered when Bertha left to go to the grocery store. Morales said he would put a movie on for B. to watch, but she had to do something for him first. Thinking he meant to touch her "private area," B. said she did not want to be touched. Morales said he wouldn't put the movie on, and went to the couch. He pulled down B.'s pants, despite her efforts to keep them up. B. does not remember how long he touched her in her vaginal area or if he penetrated her vagina. Morales then pulled down his pants, took out his "private" and put it in B.'s "private." It hurt and B. told Morales to stop. Morales also orally copulated her. Morales stopped when G. got home.

B. also recalled an incident at her house when her parents were outside. Morales pretended to use the bathroom. He locked one of the bathroom doors and then entered B.'s bedroom through the other door. He pulled down her pajama bottoms, overcoming her efforts to keep them on. When he got them down, he orally copulated her. Afterward, Morales went back into the bathroom.

B. said Morales touched her "private part" approximately 10 times and orally copulated her approximately four times. Over Leon's objection, the court admitted

into evidence a drawing B. made of Morales's penis she was asked to make during an interview shortly after police were notified of the molestations.

Leon's Molestation of B.

B. testified there was one occasion where Leon touched her inappropriately. In September 2005, she went to Leon's house to play with R., but R. was not home. Leon exited Morales's bedroom where Leon had been working. Leon took B. to his bedroom, picked her up, put her on the bed, and pulled down her pants as she struggled to pull them back up. He pulled out his "private" and put it in hers. Leon asked her if anyone had ever done that to her before. She did not tell Leon about Morales because she was afraid.

Marcos's Molestations of B.

Marcos also molested B. She said he touched her in the same way Morales and Leon did. Marcos was the first to molest B. He molested her around the same time Morales was molesting her, but not around the time of the incident involving Leon. The court took judicial notice that in 2006 Marcos "admitted to lewd and lascivious acts to a child under 14 years, two counts, in [Riverside County]."

Morales's Molestations of R.

Leon's jury was not present when R. testified. R. was 10 years old at the time of the trial. She testified she was about five years old when Morales touched her. She was in the living room at Leon's house when Morales touched her vaginal area under her pants. The second time they were in Leon's backyard. Morales picked her up and touched her in the same area, this time outside of her pants.

Morales's Admissions to the Police

Riverside Police Officer Kymberly Boemia interrogated Morales in 2005, prior to his arrest. He admitted touching R. twice. He said he touched her under her "sweats" once when they were in the living room. He said second time occurred less than six months later, in his bedroom. He admitted touching B. more recently. Morales said it was an "on and off thing," and he touched her more than five times, but less than 10. He admitted orally copulating B. in her bedroom after he used the bathroom.

II

DISCUSSION

A. *Leon's Appeal*

Leon contends he was denied a fair trial when the court permitted his jury to hear B.'s testimony concerning Morales's molestations of her and admitted B.'s drawing of Morales's penis into evidence, and that he was denied effective assistance of counsel. We address the issues in the order raised.

1. *Admission of Evidence*

Leon did not object to his jury being present when B. testified about Morales molesting her. Having failed to bring this issue to the attention of the trial judge, the issue is forfeited. (*People v. Doolin* (2009) 45 Cal.4th 390, 448; Evid. Code, § 353 [judgment may not be set aside based upon erroneous admission of evidence without a timely objection at trial].)

Leon did object to the admission into evidence of the drawing B. made of Morales's penis. B. made the drawing during an interview after it had been reported Morales had molested her. Leon argued the drawing was inflammatory, "extremely prejudicial," and had no relevance. Although the drawing was of Morales's penis, not Leon's, the court found the drawing had some relevance in Leon's case because it showed B. understands "what a penis is and was able to make a fairly accurate drawing of a penis."

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Leon was charged with one count of aggravated sexual assault on a child under 14 years of age, B. The assault consisted of B.'s rape. That required proof that Leon penetrated B., however slightly, with his penis. Thus, the fact that B. knew what a penis looks like was relevant.

A court may, in its discretion, exclude relevant evidence if its admission would "create substantial danger of undue prejudice . . . ." (Evid. Code, § 352.) Leon does not state how admission of the evidence prejudiced him. Like the trial court, we do not find any prejudice in the admission of the drawing.

In connection with Leon's argument that his jury should not have heard B. testify about Morales's molestations, he seems to argue the court erred in not severing his trial from Morales's. However, the motion was not brought before the trial judge. A trial court does not have a sua sponte duty to sever the trial of cases. (*People v. Maury* (2003) 30 Cal.4th 342, 392; *People v. Hawkins* (1995) 10 Cal.4th 920, 939, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 107, 109 [intent to kill not element of voluntary manslaughter].) We find no error.

2. *Ineffective Assistance of Counsel*

Leon claims he was denied effective assistance of counsel based upon a series of actions and inactions by his first attorney, Hernandez, and the attorney who eventually tried his case, Harrison. We address these in turn.

There is no "substantive difference between" the federal and state constitutional right to effective assistance of counsel. (*People v. Doolin, supra*, 45 Cal.4th at p. 421.) "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. (*Strickland* [*v. Washington* (1984) U.S. 668,] 687–

688, 693; [*People v.*] *Ledesma* [(1987) 43 Cal.3d 171,] 216.)" (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) "Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. [Citation.]" (*Id*. at p. 93.)

"'"'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citations.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." [Citation.] "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.] [¶] In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. [Citations.]'" [Citation.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) "On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. [Citations.]" (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007-1008.)

a. *Continuances*

Leon first contends Hernandez was ineffective by continuing his case a number of times, having other attorneys appear for him on occasion, and failing to insist upon a speedy trial. There is nothing in the record suggesting the continuances were made without Leon's consent. Thus, he fails to establish Hernandez's representation fell below an objective standard of reasonableness. Moreover, Leon makes no showing he was prejudiced in any manner by the continuances.

b. *Severance*

Next, Leon argues the motion to sever filed by Hernandez was "seriously deficient and hastily-prepared," and Hernandez did not confer with Leon's new attorney, Harrison, on the issue of severance. We do not agree with Leon's characterization of Hernandez's motion and Leon does not state what Hernandez failed to do. Hernandez's motion plainly set forth the ground for ordering a severance: the defendants were not jointly charged in any count and there is no indication they acted together or even knew of the other's crime(s). The judge who initially heard argument on the motion declined to rule on it, concluding it should be ruled on by the trial judge because there were "too many unknowns." Leon asserts Hernandez did not confer with new counsel, Harrison, about the status of the severance motion after being relieved as counsel of record. There is nothing in the record to support that assertion. Leon has failed to show he was prejudiced by Hernandez's performance in connection with the severance motion. He has also failed to demonstrate Hernandez's performance was deficient.

The record does not reveal why Harrison did not renew the severance motion. There is an apparent tactical reason for not renewing the motion: He wanted to be able to argue Grace specifically asked B. about each male member of the family and B. responded in the affirmative by rote. There is some indication in the record that Hernandez struggled with the same tactical decision. When he argued the motion to sever, Hernandez described his situation as a "Catch-22." Such a tactic would permit defense counsel to argue that B. had been molested so many times and was so traumatized, she only named Leon because, as Hernandez stated, she was "alleging that every male in her life did this to her." In an apparent effort to ameliorate Leon's situation vis-à-vis the issue of severance, Hernandez told the court he did not want to be foreclosed from introducing evidence of Morales's crimes against B. in the event the court grants a severance. Harrison may have decided not to seek a severance to assure Leon's jury would learn of Morales's crimes, thus placing Harrison in a position to argue B.'s trauma

was caused by other males in the family. This would also account for why Harrison wanted the jury to know "Marcos admitted to some conduct, that he had served time, that he's no longer a defendant in juvenile court, . . ." On this record, we cannot say Harrison rendered ineffective assistance by failing to seek a severance.

c. *Failure to Request Limiting Instruction*

Grace testified to waking B. up in the middle of the night in 2006 because "stuff came out about" Morales having molested Grace's niece (presumably R.) and Grace wanted to know if he had done anything to B. Grace took B. into her (Grace's) room and put B. into bed between M. and her. Grace said she needed to know if anyone had touched B. in her "private areas." B. immediately started crying. Grace assured B. she would be protected, and asked B. who had touched her. B. named Morales. Grace started screaming and crying. After a while, Grace asked if her own father, B.'s other grandfather, had touched her. B. said no. Grace asked if her brother, B.'s uncle, or B.'s biological father had touched her. B. said no to both. Grace said she needed to know if anybody else touched B. B. started crying hysterically. B. then said it was someone from next door. Thinking B. meant someone living in the back house, Grace asked B. if it was the neighbor. Grace said no, next door, and pointed to Leon's house. Grace asked who and B. said it was Marcos and Leon.

The prosecutor offered the evidence under the fresh complaint doctrine. "In sexual as well as nonsexual offense cases, evidence of the fact and circumstances of a victim's complaint may be relevant for a variety of nonhearsay purposes, regardless whether the complaint is prompt or delayed." (*People v. Brown* (1994) 8 Cal.4th 746, 761.) "So long as the evidence that is admitted is carefully limited to the fact that a complaint was made, and to the circumstances surrounding the making of the complaint, thereby eliminating or at least minimizing the risk that the jury will rely upon the

evidence for an impermissible hearsay purpose, admission of such relevant evidence should assist in enlightening the jury without improperly prejudicing the defendant." (*Id*. at p. 762.) Although the court must instruct the jury as to the limited purpose of evidence admitted pursuant to the fresh complaint doctrine if requested, "the trial court has no duty to give such an instruction in the absence of a request. [Citation.]" (*People v. Manning* (2008) 165 Cal.App.4th 870, 880.)

The admissibility of this evidence was raised prior to Grace testifying. The court found the evidence admissible and asked counsel to remind the court to instruct the jury as to the limited purpose of the evidence when Grace testifies. Contrary to the Attorney General's contention, the court did not provide an instruction as to the limited purpose of the fresh complaint evidence. When the prosecutor asked Grace why she woke B. up in the middle of the night, Morales objected. The court stated "the testimony is offered to show why the *witness* acted as she did." (Italics added.) The court then instructed the jury: "You are not to consider that testimony as proof of the truth of the statements. [¶] So in other words, if I go and tell my husband, honey, come outside there's a giant 10-foot rabbit in our front yard, it doesn't matter whether it's true there's actually a giant 10-foot rabbit in our yard. We're just offering it to explain why my husband came running out of the house, okay?"

Grace, not B., was the witness and the admonition did not instruct the jury that B.'s statements to Grace — which had not yet been mentioned — were only to be considered to show that B. made an initial complaint and not for the truth of the allegation. Rather, the effect of the court's instruction was to inform the jury that the reason Grace woke B. up — that Morales had molested Grace's niece and Grace wanted to know if he had molested B. — was not offered for the truth of the matter, but only to show why Grace acted as she did that night. Thus, the court did not instruct the jury as to the limited purpose of B.'s complaint to Grace. As the court earlier stated its intention to

provide a limiting instruction, the failure to do so must be attributed to counsel's failure to remind the court.

The jury heard B. testify at trial. She recounted the incident involving Leon. Her statement to Grace only named Leon as someone who had touched her in her "private areas." No details were provided; she did not tell her mother Leon had raped her. The jury was not only able to judge B.'s credibility on the witness stand, it also had the opportunity to judge Leon's credibility when he testified. Leon's attorney fully cross-examined B. about the incident and about the initial complaint to her mother. Indeed, the manner in which B.'s mother obtained the initial complaint from B. was a vital part of Leon's defense. When B. recounted that she did not give anyone's name to her mother that night and that she just "said yes to the people that [her mother] mentioned," counsel responded, "That's what I wanted to hear." Accordingly, we conclude the failure to request a limiting instruction was harmless.

d. *Polygraph Evidence*

Evidence Code section 351.1 makes inadmissible "any reference to an offer to take, failure to take, or taking of a polygraph examination." (Evid. Code, § 351.1, subd. (a).) Leon's attorney called Boemia as a defense witness and asked her if she offered Leon the opportunity to take a polygraph test. He attempted to get Boemia to admit the only reason Leon was arrested in the first place was because he eventually refused to take a polygraph test. Because Leon's attorney had questioned Boemia about the issue, the prosecutor brought out on cross-examination that Leon initially agreed to take a polygraph, went to the location to take the polygraph, and then indicated he felt sick. At that point, the court cut off questioning on the issue pursuant to Evidence Code section 352.

Any prejudice that might ordinarily be expected to flow from Leon's refusal to take a polygraph was negated by the court's immediate admonition to the jury.

"I feel it's necessary to admonish you regarding lie detector tests. [¶] Generally speaking, lie detector tests are not admissible in a court of law because they're not deemed to be scientifically reliable. [¶] And I would remind you that a defendant has a right not to testify or answer questions of the police if he chooses to do so. And you cannot infer anything from that refusal to take a lie detector test." We have no reason to suspect the jury ignored the instruction. We therefore conclude Leon was not prejudiced by his attorney's questioning of Boemia. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

e. *Late to Court*

While the record indicates Harrison was late to court more than once, Leon fails to establish any prejudice from Harrison's tardiness. The trial did not proceed in his absence and there is no reason to believe the court ever ruled adversely to Leon because his attorney was late, or that Harrison did or did not make objections to evidence because he had been late. Thus, Leon fails to establish he suffered any prejudice due to counsel's tardiness.

B. *Morales's Appeal*

1. *Abuse of Discretion in Sentencing*

As the court was in the process of pronouncing sentence, Morales's attorney urged the court to impose concurrent terms. The prosecutor told the court the probation report states the sentences may be imposed concurrently, but the law requires consecutive sentences. The court then proceeded to impose consecutive 15 years to life terms on all 10 counts. Morales contends the court abused its discretion in imposing consecutive terms based upon the mistaken belief it was required to do so.

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of

the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record. [Citation.]" (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530, fn. 13.) If consecutive terms were not required, defendant would be entitled to be resentenced because the trial court failed to exercise its sentencing discretion.[2]

Without stating why the court was wrong in its belief consecutive sentences were required, Morales's opening brief asserted consecutive sentences were not required. The Attorney General answered that section 667.61, subdivision (i) required imposition of consecutive sentences. When section 667.61 applies, subdivision (i) requires the court to "impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." (§ 667.61, subd. (i).) However, this version of subdivision (i) was enacted in 2006, after Morales committed the charged offenses (see Historical and Statutory Notes, 49 West's Ann. Pen. Code. (2010 supp.) foll. § 667.61, p. 276) and cannot constitutionally be applied to his convictions. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43 [legislature may not retroactively increase the punishment for criminal acts].)[3] We invited the parties to submit supplemental briefs addressing whether section 667.6, subdivision (d), or some other provision of law required consecutive sentencing in this matter.

At the time of Morales's offenses, subdivision (d) of section 667.6 mandated consecutive sentences and listed the offenses to which it applied. That

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[2] Although the court stated it would impose consecutive sentences even if it was not required to do so, it did not state any reasons why.

[3] At the time of the charged offenses, section 667.61, subdivision (i) provided: "For the penalties provided in this section to apply, the existence of any fact required by subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by defendant in open court or found to be true by the trier of fact."

subdivision provided in pertinent part: "A full, separate, and consecutive term shall be served for each violation of . . . subdivision (b) of Section 288, . . . if the crimes involve separate victims or involve the same victim on separate occasions." (§ 667.6, former subd. (d).)[4] Morales stands convicted of 10 counts of violating section 288, subdivision (b). His offenses meet each alternative requirement of section 667.6, subdivision (d). His offenses involved two victims, B. and R. The offenses committed against B. occurred on a number of separate occasions. The first incident happened on the couch in B.'s house when they were watching a movie together, a second incident occurred on the couch in Leon's house on a day B. stayed home from school with the flu, and a third incident occurred in B.'s bedroom when her parents were outside the house. These were not the only times Morales molested B. She said he touched her "private parts" approximately 10 times and orally copulated her approximately four times. Additionally, Morales molested R. on two separate occasions. The first time was in the living room at Leon's house and the second time was in the backyard of Leon's house.

"The language of section 667.6, subdivision (d) is quite broad and inclusive and does not distinguish between consecutive service of determinate and indeterminate terms. Had the Legislature chosen to make that distinction, it could have added explicit language to section 667.6, subdivision (d)." (*People v. Jackson* (1998) 66 Cal.App.4th 182, 192.) Like the courts in *People v. Jackson*, *supra*, 66 Cal.App.4th 182, and *People v. Chan* (2005) 128 Cal.App.4th 408, 424, we conclude section 667.6, subdivision (d) applies to indeterminate as well as determinate sentences for violations of section 288, subdivision (b), if the crimes involve separate victims or the same victim on separate occasions. Because Morales's crimes involved separate victims and separate occasions, the court was required to impose consecutive sentences.

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[4] Presently, subdivision (e) of section 667.6 lists the offenses to which that section applies and subdivision (d) contains the consecutive sentence requirement. (§ 667.6, subds. (d), (e)(1) – (10).)

Morales's contention that the trial court was required to "specify [its] reasons for ordering the multiple life sentences be served fully and consecutively to each other, per Penal Code section 667.6 [subdivision] (d)" is without merit. "Where the court sentences under [section 667.6, subdivision (d)], it is not required to state reasons for imposing a full consecutive sentence. [Citations.]" (*People v. Smith* (1984) 155 Cal.App.3d 539, 543.)

2. *Cunningham v. California*

To the extent Morales argues the court violated *Cunningham v. California*, *supra*, 549 U.S. 270 by imposing consecutive sentences based upon facts not found by the jury, the argument lacks merits. The Sixth Amendment does not require the jury to determine facts used to impose consecutive sentences. (*Oregon v. Ice* (2009) ___ U.S. ___ [129 S.Ct. 711, 714-715]; *People v. Black* (2007) 41 Cal.4th 799, 823.)

III

DISPOSITION

The judgments are affirmed.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.